Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 1998

Robert M. Temple

Petitioner,

v.

United States of America
Internal Revenue Service

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
In and for the Sixth Circuit

Petition for Writ of Certiorari

Robert M. Temple*
c/o 5955 Stroups Hickox Road
Bristolville, Ohio 44402
(330) 889-3952

*Petitioner, In Propria Persona

43 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Appeals Officer of the Internal Revenue Service, who is exercising agency jurisdiction exclusive and independent of the United States Tax Court, is subject to Review in the United States Court of Appeals, when the decision of the Appeals Officer is wanting in due process and fails to address the merits of the Appeal?

THE PARTIES

The other party not specifically identified in the caption, but which could be affected is the Commissioner of Internal Revenue who is the Respondent in the United States Tax Court in *Temple v. Commissioner*, 20371-96

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The Petitioner, Robert M. Temple (Temple or Petitioner), hereby Petitions this Court for a Writ of Certiorari to the United States Court of Appeals in and for the Sixth Circuit to review its April 6 , 1998 decision.

OPINION OF THE COURT BELOW

The decisions and orders of the Appeals Officer and the United States Court of Appeals for the Sixth Circuit are unpublished and are found in Appendix A to the Petition.

JURISDICTION

The Court of Appeals for the Sixth Circuit its judgment declining to accept jurisdiction of Temple's Petition for Review on June 23, 1998. [App., Pgs. A-1]. Temple timely filed his Petition for Rehearing which was denied on July 22, 1998. [App., Pg. A-3]. The jurisdiction of this Court to review the judgment of the Supreme Court's judgment denying the Petition for Review by writ of certiorari is invoked under the provisions of 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are involved. The text of each provision is found in Appendix B. 5 U.S.C. § 551 *et. seq.* and 5 U.S.C. § 701.

STATEMENT OF THE CASE AND FACTS

1. The case arises from the failure and refusal of the Appeals Officer to properly exercise his agency jurisdiction which is independent and exclusive of the United States Tax Court. [App., Pg. 7]. He failed and refused to resolve the matter even though the Commissioner of Internal Revenue (Commissioner) failed to me his burden of proof for the fraud alleged in the tax deficiency to have been determined by the Commissioner.

2. On Petition for Review to the United States Court of Appeals Sixth Circuit the Court converted the Petition into an appeal and then dismissed for lack of jurisdiction. [App., Pg. 1] The Sixth Circuit declined to grant the Petition for Rehearing. [App., Pg. 3]

3. On July 26, 1996, the Commissioner of Internal Revenue issued a Notice of Deficiency under the Internal Revenue Laws for the years 1988, 1989, 1990, 1991 and 1992. The basis for the deficiency was fraud. The Petitioner timely petitioned the United States Tax Court and the matter is now pending in that Court at Docket No. 20371-96.

4. After the Petitioner filed his First Amended Petition and the Commissioner Answered the Petition with his allegations of fraud, the matter was transferred to the exclusive and independent jurisdiction of the Appeals Office on or before July 16, 1997 [App., Pg. A-5] per Commissioner's Delegation Order (CDO) 60.

5. After the Petitioner appeared before Appeals Officer John S. Comella, without requiring the Commissioner to meet his burden of the fraud, the Appeals Officer turned the matter back to District Counsel for trial preparation. [App., Pg. 7].

REASONS FOR GRANTING WRIT & ARGUMENT

The decision by the United States Court of Appeals for the Sixth Circuit that it does not have jurisdiction to review the decision of the Appeals Officer of the Internal Revenue Service decided an important federal question in a way that conflicts with the decisions of other United States Court of Appeals

The Appeals Officer of the Internal Revenue Service is granted exclusive and independent jurisdiction to resolve a case pending in the United States Tax Court. (CDO 60; 26 CFR § 601.106(d)(3)(iii)(a)[1] A case is assigned to the Appeals Officer after the case in the United States Tax Court is at issue. (*id.*). Having independent and exclusive jurisdiction from the United States Tax Court to settle the

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1/ PART 601--STATEMENT OF PROCEDURAL RULES
Subpart A--General Procedural Rules
Sec. 601.106 Appeals functions.
(a) The Appeals office will have exclusive settlement jurisdiction for a period of 4 months over certain cases docketed in the Tax Court. The 4-month period will commence at the time Appeals receives the case from Counsel, which will be after the case is at issue.

case makes the Appeals Officer's decision a final agency order.

The issue before the lower court was whether or not the court had jurisdiction and authority to deal with a petition to review a final agency order.. The existence of Title 5 U.S.C. §§ 551 *et. seq.* and 701 *et seq* is prima facie evidence of the intent of Congress to grant a remedy. There is no exclusionary statute in Title 26 U.S.C. or Title 5 U.S.C. identifying the Internal Revenue Service (hereinafter IRS) as being exempt from it's provisions. The only evidence of exclusion to the IRS is found at 26 U.S.C. §7852(e), which relates strictly to specific segments of the Privacy Act. Nothing more, exists. The requirement of the Sixth Circuit is tantamount to requiring the Petitioner to prove water is wet.

This Supreme Court in *Town v. Eisner* 245 US 418 stated:

> The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the Act. But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. Lamar v. United States, 240 U.S. 60, 65, 36 S. Sup. Ct. 255. **Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the Court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the**

reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this Court should think that the construction would make the Act unconstitutional. While it keeps the money it opens the question whether the Act construed as it has construed it can be maintained. The motion to dismiss is overruled. Billings v. United States, 232 U.S. 261, 276, 34 S. Sup. Ct. 421; B. Altman & Co. v. United States, 224 U.S. 583, 596, 597 S., 32 Sup. Ct. 593. [245 U.S. 418, 426] The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. Billings v. United States, ubi supra.

The relevancy of the Town case is simple. This court accepted jurisdiction on the basis that the complaint presented and the defense made was of such a nature that constitutional resolution was required. The government can't rely on the fact that it exists to compel performance nor deny relief. The law exists and the government and courts are as subject to it as Petitioner. Based on the rights reserved in the constitution to the people, Petitioner has been denied due process, the right to property and equal protection under the law. A principle which even the Appeals Officers own Rules acknowledge. See 26 CFR § 601.106(f)(1) ***Rule I***[2]

At all phases of a controversy Petitioner is entitled to due process. The government is responsible for having written the protective statutes, therefore there must be a

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2/ Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.

statute excluding the IRS rather than the contrary. If the statutes cannot be relied upon to prove jurisdiction then Congress has perpetrated a fraud on the states and people. There is no list of applicability within Title 5 U.S.C. therefore it is applicable to all agencies and exclusions must be identified, rather than the contrary.

Title 5 U.S.C. Chapter 5, sections 551, through and including 559 (Administrative Procedures Act) and Chapter 7 sections 701 through and including 706 (Judicial Review) relating to agencies generally together provides jurisdiction for the review in the instant action along with the manner and scope of the review.

The presumption is that the agency action can be reviewed and the burden of proving to the contrary rests clearly on the agency.[3] Only a few of the many cases found and adjudicated are quoted herein as follows:[4]

This subchapter (5 U.S.C. § 551 *et.seq.*) and chapter 7 of this title and the Federal Register Act, section 301 et seq. Of Title 44, must be read as a part of every congressional delegation of authority unless specifically excepted. *Hotch v. US*, 212 F.2d 280, 14 Alaska 594 (9th Cir., 1954); This subchapter and chapter 7 of this title are to be given "hospitable" interpretation. *Shaughnessy v. Pedreiro*, 349 US 458 (1955); *Wong Yang Sung v.*

3/ **Burden of establishing nonreviewability on agency**: *Alameda County v. Weinberger*,, 520 F.2d 344 (9th Cir., 1975); *Bachowski v. Brennan*, 502 F.2d 79 (3rd Cir., 1974)

4/ See also: *Rothman v. Hospital Service of Southern California*, 510 F.2d 956 (9th Cir., 1975); *U.S. Steel Corp. v. Fri*, 364 F.Supp. 1013 (D. Ind., 1973); *Davis Associates, Inc. v. Secretary, Dept. of Housing and Urban Development*, 498 F.2d 395 (1st Cir., 1974); *Fekete V. U.S.Steel Corp.*, 424 F.2d 331 (3rd Cir., 1970); *City of Santa Clara, Cal. V. Kleppe*, 418 F.Supp. 1243 (N.D.Cal., 1976)

Generally, when Congress has specified a procedure for judicial review of administrative action, courts will not make non statutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutory-prescribed method of review. *Nader v. Volpe*, 466 F.2d 261, 151 US App. D.C. 90 (D.C. Cir., 1972)

McGrath, 339 US 33 (1950); *Superior Oil Co. v. Federal Power Commission*, 322 F.2d 601 (9th Cir., 1963); Broad remedial purposes of this subchapter and chapter 7 of this title suggests that narrowing exceptions should not be extended by strained construction. *Chotin Towing Corp. v. Federal Power Commission*, 250 F.2d 394, 102 US App.D.C. 69 (D.C. Cir., 1957); **This subchapter and chapter 7 of this title should be interpreted with a view to the abuses in former administrative procedure which this subchapter and chapter 7 of this title were designed to correct** *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir., 1954); *O'Dwyer v. C.I.R.*, 266 F.2d 575 (4th Cir., 1959); **This subchapter and chapter 7 of this title govern all administrative proceedings except to the extent that another statute exempts the agency from coverage.** *Dimaren v. Immigration and Naturalization Service*, 398 F.Supp. 566 (D.C.N.Y., 1974). (*see also, El of Hansson, Inc. v. US*, 178 F.Supp. 922 (Cust.Ct, 1959); *Couto v. Shaughnessy*, 123 F.Supp. 926 (D.C.N.Y., 1954); **This subchapter and chapter 7 of this title were framed as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices, and they create safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.** *U.S. v. Morton Salt Co.*, 338 US 632 (1950); **This subchapter and chapter 7 of this title were enacted to bring the decision of controversies back into the judicial system.** *Adams v. Witmer*, 271 F.2d 29 (9th Cir., 1959); *T.S.C. Motor Freight Lines, Inc. v. US*, 186 F.Supp. 777 (D.C.Tex, 1960), *affirmed* 366 US 419 (1961); Prototype of intermediate proceeding that is "agency process for the formulation of an order" within this subchapter and chapter 7 of this title is hearing before administrative law judge who makes findings of fact and conclusions of law and initially decides the case, and whose recommended decision "becomes the decision of the agency ... unless there is an appeal to, or review on motion, of the agency" *International Tel. & Tel. Corp., Communications Equipment and Systems Division v. Local 134, Intern.*

Broth. Of Elec. Workers, AFL-CIO, 419 US 428 (1975); Generous review provisions of this chapter must be given a hospitable interpretation. *Abbott Laboratories v. Gardner*, 387 US 136 (1967). *See also Moore-McCormack Lines, Inc. v. US*, 413 F.2d 568, 188 Ct.Cl. 644 (Ct.Cl, 1969); *Stephens v. Smith*, 294 F.Supp. 31 (D.C.Va., 1968); The Administrative Procedure Act's judicial review provisions [now covered by this chapter] were to be broadly construed so as to grant judicial review of administrative decisions wherever possible. *US v. One 1957 Buick, Roadmaster*, 167 F.Supp. 597 (D.C. Mich, 1958). See also, *Atchison, T. & S. F. Ry. Co. v. U.S.*,130 F.Supp. 76 (D.C.Mo., 1955), *affirmed* 350 US 892 (1956); Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was purpose of Congress. *Abbott Laboratories v. Gardner*, 387 US 136 (1967); Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was purpose of Congress; only upon showing of clear and convincing evidence of contrary legislative intent should courts restrict access to judicial review. *Western Pac. R. Co. v. Habermeyer*, 382 F.2d 1003 (9th Cir., 1967); *Shaughnessy v. Pedreiro*, 349 US 458 (1955); *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir., 1975). *See also Littell v. Morton*, 445 F.2d 1207 (4th Cir., 1971) on remand 369 F.Supp. 411; *Tempo Trucking & Transfer Corp. v. Dickson*, 405 F.Supp. 506 (D.C.N.Y., 1975); *American President Lines v. Federal Maritime Bd.*, 112 F.Supp. 346 (D.C.D.C., 1953); *Chernack v. Garner*, 360 F.2d 257 (3rd Cir., 1966); *State of N.H. v. Boston & Main Corp.*, 251 F.Supp. 421 (D.C.N.H., 1965); **Where a prima facie showing of illegal agency action is made, in a proceeding brought under this chapter, question is uniquely appropriate for judicial determination, and a plea that such action is reserved to agency discretion will not be allowed to deny review.** *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 137 U.S.App.D.C. 371 (D.C.Cir., 1970); **Only on a showing of clear and convincing evidence of a contrary legislative intent should courts restrict access to judicial review of an agency action.** *Stephens v.*

Smith, 294 F.Supp. 31 (D.C. Va., 1968); Where an Act does not provide procedures for judicial review of agency decision, "nonstatutory" review is still available. *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir., 1975); **Reviewability of agency action under this section is presumed**; however, judicial review is foreclosed where there is persuasive reason to believe that such was purpose of Congress or where regulatory statute itself precludes judicial review *Paramount Farms, Inc. v. Morton*, 527 F.2d 1301 (7th Cir., 1975); *Baltimore & O.R. Co. v. Alabama Great Southern R. Co.*, D.C.D.C.1972, 350 F.Supp. 719 (D.C.D.C, 1972) *affirmed* 506 F.2d 1265, 165 U.S.App.D.C. 226 (D.C.Cir., 1975); If a particular organic statute is silent on the question of judicial review of an agency's action, courts should recognize basic presumption favoring judicial review embodied in this chapter. *Action on Safety and Health v. F.T.C.*, 498 F.2d 757, 162 U.S.App.D.C. 215 (D.C.Cir., 1974); Mere absence of review provision in statute pertaining to administrative agency evidences no intent to withhold review of agency's decision and, on the contrary. judicial review of final agency action by aggrieved person will not be cut off unless there is persuasive reason to believe that such was purpose of Congress. *Moore-McCormack Lines, Inc. v. U.S.*, 413 F.2d 568, 188 Ct.Cl. 644 (Ct.Cl., 1969); Judicial review is the rule and nonreviewability an exception which must be demonstrated. *Fekete v. U.S.Steel Corp.*, 424 F.2d 331 (3rd Cir., 1970); **Party claiming applicability of exceptions to general rule of reviewability bears heavy burden of demonstrating by clear and convincing evidence that Congress intended to restrict access to courts.** *Simoncelli v. Weinberger*, 418 F.Supp. 87 (D.C.Pa., 1976).

The Sixth Circuit cites the Anti-Injunction (26 U.S.C. § 7421(a)) and the Declaratory Judgments Acts (28 U.S.C. § 2201) as the statutory rational for lack of jurisdiction. The action before the lower court had nothing to do with an assessment or collection of a tax. The action was literally about a denial of due process by the agency resulting in a final agency order. There being no rights of administrative review (26 U.S.C. § 6406) left open to the Petitioner, he then sought relief from the final agency

order. An agency order is final when there is no other administrative relief available and the result is final.

The United States Tax Court is not a part of the agency, it is considered an appeal of the initial agency decision in the form of a Notice of Deficiency. The prerequisite for admission to the court is a stipulation and physical existence of a notice of deficiency. Such a stipulation denies Petitioner any administrative relief, because the United States Tax Court relies on Rule 142(a) to allegedly grant a presumption of correctness on behalf of the Commissioner and impose the burden of proof upon the Petitioner except in cases of fraud (Rule 142(b). Fraud is an issue in this instant case.

The resulting harm from the consistent refusal by both the Appeals Officer, particularly when the Commissioner has the burden of proof and he failed to meet that burden, and courts to provide due process is clearly impressionable upon this court. To proceed otherwise could result in the creation of an irrebutable presumption that all agency actions are correct. Therefore, no property is safe from confiscatory acts of the agency. There is also a complete denial of due process and constitutional rights to own, acquire and protect property, as well as equal protection.

Wherefore Petitioner Robert M. Temple prays this court review and overturn the decision of the Sixth Circuit and rule on behalf of the petitioner.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit erred first in treating the Petitioner's Petition for Review of an Agency Order as an appeal and then in dismissing the appeal for lack of jurisdiction.

Accordingly, and for the forgoing reasons, this Court should issue its Writ of Certiorari to the United States Court of Appeals in and for the Sixth Circuit, and in further proceedings as the Court deems necessary set aside the Court of Appeals June 23, 1998 Order and remand this action to the United States Court of Appeals for the Sixth Circuit for further proceedings not inconsistent with the opinion of this Court.

RESPECTFULLY SUBMITTED this 20th day of October, 1998.

Robert M. Temple

Robert M. Temple
c/o 5955 Stroups Hickox Road
Bristolville, Ohio 44402
Petitioner, In Pro Per

APPENDIX A

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APPENDIX A

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No. 98-3069

IN THE UNITED STATES COURT OF APPEALS
IN AND FOR THE SIXTH CIRCUIT

FILED JUNE 23, 1998
LEONARD GREEN, CLERK

ROBERT TEMPLE,	)
Petitioner	) ORDER
v.	)
	) Not Recommended
	) for Full Text
UNITED STATES OF AMERICA	) Publication
INTERNAL REVENUE SERVICE	)
	) Sixth Circuit Rule 24
Respondents	)

Before: MOORE, CLAY, and GILMAN, Circuit Judges

This matter is before the court upon consideration of appellate jurisdiction. Petitioner appealed from a letter of the Appeals Officer of the Internal Revenue Service. An Order was entered by this court directing petitioner to show cause why this appeal should not be dismissed. Petitioner responded to this court's order stating that he has a right to petition the government for relief and a remedy, that he has no other remedy to seek relief from a letter of the Appeals Officer of the Internal Revenue Service, that there are presumptions that the agency action can be reviewed, and that the aggrieved party has the right to a judicial remedy unless specifically prohibited by statute.

Although this court's show cause order provided for the respondent to file a reply, respondent instead chose to file a motion to dismiss. The respondent states that there is no statute allowing this court to directly review any administrative action by the Internal Revenue Service, there is no jurisdictional basis for the appeal, the refusal of the Internal Revenue Service to settle a pending Tax Court Case is not a final decision, and the petitioner has an adequate legal remedy available in the Tax Court which petitioner is currently pursuing. Petitioner replied with a motion to strike the motion to dismiss stating that

it was filed out of time, the caption of the motion to dismiss is incorrect, and the respondent is arguing issues not before the court.

A review of the documents before the court indicates that by letter dated Spetember 29, 1997 an Appeals Officer of the Internal Revenue Service advised the petitioner that he found no basis for the arguments raised at the appeals conference, and he advised the petitioner that the case was being forwarded to District Counsel for trial preparation. Petitioner filed a petition for review of that letter.

This court lacks jurisdiction in this case. This court has jurisdiction to review a final decision of the Tax Court. See 26 U.S.C. §7483. However, there was no final decision of the Tax Court from which petitioner appealed. The Administrative Procedure Act does not provide any basis for review of a taxpayer's liability. Humphreys v. United States, 62 F.3d 667, 671 (5th Cir. 1995); Fostvedt v. United States, 978 F2d 1201-04 (10th Cir. 1992). cert denied, 507 U.S. 988 (1993).

It is ordered that the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

Leonard Green (sig.)
Clerk

No. 98-3069

IN THE UNITED STATES COURT OF APPEALS
IN AND FOR THE SIXTH CIRCUIT

FILED JULY 22, 1998
LEONARD GREEN, CLERK

ROBERT TEMPLE,	)
	)
Petitioner	)
v.	)
	) ORDER
UNITED STATES OF AMERICA	)
INTERNAL REVENUE SERVICE	)
	)
Respondents	)
	)

Before: MOORE, CLAY, and GILMAN, Circuit Judges

Petitioner has filed a petition for rehearing of this court's order of June 23, 1998 dismissing his appeal for lack of jurisdiction.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green (sig.)
Clerk

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Internal Revenue Service
Department of the TReasury
Northeast Region
Date: July 16, 1997
Address any reply to:
Appeals Office
One Cleveland Center
1375 East Ninth Street, Suite 815
Cleveland, OH 44114
Taxpayer:
Robert M. Temple
Docket Number:
23071-96
Date and Time:
9:00 a.m.
Friday, September 19, 1997
Place:
IRS Appeals Office, Suite 815
One Cleveland Center
1375 East 9th Street
Cleveland, Ohio
Contact Telephone Number:
(216) 623-2021
Fax Number:
(216) 522-7910

Robert M. Temple
5955 Stroups Hickox Road
Bristolville, OH 44402

Dear Mr. Temple:

Since it will be to our mutual advantage to settle without trial the issues in your case now pending before the United States Tax Court, the case has been referred to this Appeals Office. For a limited time, our office has sole settlement authority. If a settlement is not reached, we are required to refer the case to District Counsel for trial preparation. Because the time period for our consideration of Tax COurt Cases is very limited, I have scheduled a conference for the date and time shown above.

At the conference you may informally discuss the facts, arguments, and legal authority to support your position. If you have evidence or legal authority not previously presented, please send it to me at least 2 weeks before the conference. Statements of fact should be submitted as affidavits or signed under penalties of perjury.

I would appreciate your letting me know within 10 days from the date of this letter whether the date and time scheduled for the conference are convenient. My telephone number is shown above.

Sincerely yours,

sig.
John S. Comella
Appeals Officer

Internal Revenue Service
Department of the TReasury
Northeast Region
Date: September 29, 1997
Address any reply to:
Appeals Office
One Cleveland Center
1375 East Ninth Street, Suite 815
Cleveland, OH 44114
Person to Contact:
John S. Comella
Telephone Number:
(216) 623-2021
Fax Number:
(216) 522-7910
Refer Reply to:
AP:NER:CLE:JSC
In Re:
Docket No. 23071-96
Tax Periods:
1988, 1989, 1990, 1991, 1992

Robert M. Temple
5955 Stroups Hickox Road
Bristolville, OH 44402

Dear Mr. Temple:

I have carefully reviewed and considered the aeguments set-out in your "Appeals Conference Issues for Review" document which you gave me at our meeting on September 19.

I've concluded your arguments are without merit. My research revealed that these and similar arguments have been advanced before and have been rejected by the Tax Court as being irrevelevant. See for example Boyce v. Commissioner, T.C. Memo 1990-555. Also, I found, that the Tax Court "...will not generally explore the underpinnings of the notice of deficiency to examine respondent's [IRS] administrative policy, motives, procedures, or evidence used in arriving at the

determination of the deficiency." See Zinc v. Commissioner, T.C. Memo 1990-634, and citations noted therein.

The Statutory Notice of Deficiency in your case is valid - and I've considered the issues raised in the notice and the evidence as well. I believe the Government has a very strong position on each issue - there's no basis, in my opinion, for anything less than full concession on your part.

I'm going to forward your case to District Counsel for trial preparation. Should you decide not to litigate, District Counsel will give you the necessary documents to close your case.

Sincerely yours,

sig.
John S. Comella
Appeals Officer

APPENDIX B
STATUTES

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TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I - THE AGENCIES GENERALLY

CHAPTER 5 - ADMINISTRATIVE PROCEDURE

SUBCHAPTER II - ADMINISTRATIVE PROCEDURE

Sec. 551. Definitions-For the purpose of this subchapter

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title -

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations

thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency -

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency -

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Sec. 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a* (FOOTNOTE 1) administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of -

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

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*/ So in original

(c) The agency shall give all interested parties opportunity for -

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not -

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply -

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence -

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may -

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Sec. 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses -

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions -

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions. The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law -

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding: (i) all such written communications; (ii) memoranda stating the substance of all such oral communications; and (iii) all written responses, and memoranda stating the substance of all oral responses, to

the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

Sec. 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements. When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Sec. 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

CHAPTER 7 - JUDICIAL REVIEW

Sec. 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that -

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter -

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Sec. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1)

affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Sec. 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Sec. 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required

and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.